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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-476

ARLAM CARR, JR., *et al.*,

and

PENELOPE ANNE JENKINS, *et al.*,

Petitioners,

vs.

MONTGOMERY COUNTY BOARD OF EDUCATION, *et al.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF OF PETITIONERS

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Introduction

In their Brief in Opposition[1] the respondents argue, in essence, that this Court should not grant a writ of certiorari herein for the following reasons:

1. The Board has continually acted in good faith in attempting to meet its responsibility to desegregate;

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[1] References to the Brief in Opposition will be noted as (Res. Br. —).

2. The trial judge was correct in finding that the remaining all-black schools were not vestiges of the dual system;

3. Plans submitted by petitioners for achieving greater desegregation of the remaining one-race schools were impractical and designed with impermissible goals in mind ("racial balance"); and that

4. The Board's plan achieves meaningful desegregation in a fashion that does not unduly burden blacks.

Point two above has been dealt with at length in our brief in chief which establishes, we submit, that the remaining all-black elementaries have been all-black since a state-imposed dual system was sanctioned by law in Montgomery County.[2] We would like to take this additional opportunity, however, to address points one, three and four in order to correct certain material misstatements and inaccuracies in the Brief in Opposition.

Argument

Petitioners do not seek to quarrel here over the question of whether the Montgomery County Board of Education has acted in good faith in carrying out its constitutional duty to dismantle its dual system of segregated schools. For "good faith" is simply not at issue in this litigation or in any school desegregation case, for that matter. The central issue turns, rather, upon the answers to factual questions, as ths Court has pointed out so often: Is the desegregation plan under consideration one "that promises realistically to work *now*?" *Green* v. *County School Board of New Kent County*, 391 U.S. 430, 439 (1968); does the plan "achieve the greatest possible degree of actual de-

[2] Petition for a Writ of Certiorari at 12-21.

segregation?" *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 26 (1971).

As the most recent enrollment statistics for the 1975-76 academic year in Montgomery County reflect, the answers to both the foregoing questions must be in the negative.[3] According to this report, 35,211 students are enrolled in the Montgomery County system for the current academic year, of which 17,029 are black and 18,182 are white. Out of the total black enrollment, 8484 are attending elementary schools. And of this number, 5011 or 59% are enrolled in facilities that are 85% or more black. The following chart indicates with more specificity the schools and black ratios which vividly attest to the continuing dual nature of elementary education in Montgomery County:

School	*Black Enrollment*	*White Enrollment*	*% Black*
Bellinger Hill	188	34	85
Booker Washington	234	3	99
Carver	393	9	98
Daisy Lawrence	363	5	99
Davis	678	47	94
Dunbar	296	38	89
Fews	643	1	99.9
Hayneville Road	713	22	97
Loveless	823	1	99.9
Paterson	516	21	97
Pintlala	164	13	93
Totals[4]	5011	193	

[3] A copy of the Board's "Report to the Court" of September 24, 1975 is attached hereto as an appendix for the Court's benefit.

[4] This total does not include elementary students attending Bellingrath which serves junior high school students as well since no breakdown by grade is given in the Report. The total black-white enrollment is 858 black and 232 white.

Plans submitted by petitioners were deficient, the Board asserts, first, because they relied upon non-contiguous pairing and clustering and rezoning to achieve greater desegregation and, secondly because they were designed with an eye to achieving an impermissible racial balance among schools in the system. Non-contiguous pairing and clustering have been sanctioned by this Court as viable tools for achieving a unitary school system. *Swann, supra.* The fact that a system must alter grade structures in its schools from the traditional 1-6, 7-9, 10-12 arrangement to accommodate desegregation in this fashion is of no constitutional moment. Moreover, the Board undoubtedly intends in its brief to leave the false impression, as did the trial court in its opinion, that petitioners' plans involved travel times and distances far out of line with transportation of students prior to 1974 and under its own "desegregation plan". The facts are otherwise. Under the plan approved by the district court in 1970, a significant number of students transported lived in so-called "periphery zones" in rural Montgomery County and were bused to schools in the City. During the 1973-74 academic year, the longest one-way bus-trip was 46 miles and a number of trips exceeded 30 miles one way. Most of the children bused under this arrangement traveled more than 10 miles one way; and the shortest distance any child traveled was 6 miles one way. Under the plan approved by the district court currently in force some black children are bused distances of nine and twelve miles each way.

In contrast, petitioners' plans envisioned transportation times and distances often far below those previously or presently approved by the Board and district court. It must be remembered that of those all-black schools listed in the chart at page 3 *supra*, only Dunbar and Pintlala are located outside of the City of Montgomery. The City

of Montgomery at its furthest extremities is about 12 miles from west to east and 10 miles from north to south. Movement from point-to-point in any direction within the city limits is facilitated by the existence of two major freeways. It has no major natural or man-made obstacles to transportation within its limits. Given these facts, the following times and distances in petitioners' plans for desegregating the city elementary schools are not surprising:

1. Under the plan of petitioners Carr, et al., the longest distance and time between paired schools would have been 10 miles and 30 minutes, involving two schools at the extreme opposite ends of the City. Other pairings would have required less travel;

2. Under the plans of petitioners Jenkins, et al. the longest route within the city would have been 7.3 miles and 18 minutes. And, if certain satellite zone features of the plans had been discarded (an option available to the trial court), routes would have rarely exceeded 5 miles. The average travel distance under these plans would have been 4-5 miles.

In light of these figures the Board's reliance upon *Northcross* v. *Board of Education of Memphis*, 489 F.2d 15 (6th Cir. 1973), *cert. denied*, 416 U.S. 962 (1974) seems ill-founded. There the lower courts rejected as unreasonable a plan that would have transported students between 46-60 minutes one way. As in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), where this Court approved student transportation averaging about seven miles and taking not over 35 minutes, *Id.* at 30, transportation times and distances in petitioners' plans fell well within the bounds of previous busing arrangements and often fell below the Board's projections under its own plan. The Board has, nevertheless, joined the trial court in ig-

noring this Court's directive in *Swann* to evaluate transportation plans in terms of whether "the time or distance of travel is so great as to either risk the health of the children or significantly impinge on the education process." The district court's bald assertion that pairings and clusterings "would substantially increase the time and distance that students would have to travel" [5] and emphasis upon the number of students to be transported under the respective plans, which the Board echoes in its brief,[6] are plainly attempts to avoid the facts vindicating petitioners' position.

It is also suggested by the Board that petitioners' plans were constitutionally defective because they sought to achieve racial balance to the detriment of all other reasonable considerations. In actuality, petitioners' plans did no more than rely upon this Court's approval in *Swann, supra* of the use of system-wide ratios as starting points in any reasonable attempt to desegregate a dual system. Racial balance was not the objective of nor was it the result achieved by petitioners' plans. In the City of Montgomery, racial ratios under the plan of petitioners Carr, et al. ranged from 24% black to 66% black. And under the plans of petitioners Jenkins, et al. black percentages were 84% to 27% black and 100% to 7% black respectively. The Board's brief itself establishes that the "racial balance" charge leveled at petitioners' plans is spurious by acknowledging that some all-black schools and racially-identifiable schools were left under all submissions.[7] Hence, on yet another issue, the district court and Board have characterized petitioners' plans in a fashion at odds with the factual record.

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[5] Appendix to Petition p. 16a-17a.
[6] Res. Br. 30.
[7] Res. Br. 36, 40, 47.

The Board has also attempted to convey the impression that its desegregated plan does not impose undue burden upon blacks nor transport blacks disproportionately. It does so by pointing out that "2401 white children [are] transported to schools which are predominantly black or would be predominantly black without the white transportation involved," [8] that several formerly all black schools will become predominantly white," [9] and that "no white child is transported past a majority black school to a majority white school." [10] We would respectfully submit that the Board's references are entirely to transportation or assignment of white junior high or senior high students. It remains true, nevertheless, that no white elementary child is bused to increase desegregation and that whites bused as part of the plan are sent to majority white schools, often by-passing closer majority black schools in transit.[11] The Board plan, in fact, envisioned a decrease in elementary school transportation. In 1973-74, the Board transported 5,388 elementary students of which 3,177 or 59% were black. Under the plan presently in effect, 4,465 elementary students were to be transported, of which 3,157 or 71% were to be black. As a result, *903* fewer white students and only 2 fewer black students were to be bused in 1974-75 as compared to 1973-74 figures.[12] That the transportation of

[8] Res. Br. 19.

[9] Res. Br. 22.

[10] *Id.*

[11] For example, 130 black children and 14 white children who previously attended Chilton, a school closed under the Board's plan, are being transported four and five miles to Head Elementary and Dalraida Elementary, majority-white schools even though Bellinger Hill, Booker Washington, Fews, Loveless and Daisy Lawrence are within walking distance of the Chilton zone.

[12] Much of the reduction in white elementary student transportation can be attributed to the construction of two new elementaries, Vaughn Road and Eastern By-Pass (now Dozier), at the eastern edge of Montgomery City.

solely blacks for purposes of elementary desegregation was a consequence of the Board's concern for "white flight" was not, contrary to the assertion in its brief, a rationale of petitioners' creation. The testimony quoted below of Mr. Silas Garrett, Superintendent of Schools for the Montgomery system, on this point is dispositive, we submit:

> The Court: His question is why doesn't the Board propose to transport white students to predominantly black [elementary] schools? He says under your plan, there is [sic] no instances where you do that.
>
> Witness: Oh.
>
> The Court: Is there a reason? That is his question.
>
> Witness: Yes, sir: Our reason is this; that we do not believe that white children so assigned would attend in any substantial numbers. And, here again, it would, in our opinion, be an operation in futility, and it would not further the overall desegregation of this school system.[13]

In order to avoid potential white flight, therefore, the Board's plan was designed such that only one elementary school out of 33 was projected to be between 40-60% white; twenty schools were projected to be between 60-80% and eleven schools were projected to be between 0-19% white. The pattern is one of arranging for the maintenance of 60% or better white schools or virtually all-black schools. In sum, the Board, not petitioners, was concerned about "racial balance"—to avoid anticipated white flight—in structuring its plan.[14]

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[13] Tr. p. 240 (April 24, 1974 hearing). Similar testimony occurs at Tr. pp. 251-52 with respect to the potential for "a white exodus."

[14] Cf. *Brewer* v. *School Board of City of Norfolk*, 434 F.2d 408, 411 (4th Cir. 1970) *cert. denied*, 399 U.S. 929 (1970).

CONCLUSION

For the foregoing reasons, petitioners respectfully submit that a writ of certiorari should be granted in this cause.

Respectfully submitted,

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EXHIBIT "A"

MONTGOMERY PUBLIC SCHOOLS
Montgomery, Alabama

A REPORT TO THE FEDERAL COURT
September 15, 1975

SCHOOL	NORMAL CAPACITY	ACTUAL ENROLLMENT BLACK	ACTUAL ENROLLMENT WHITE	NO. FACULTY BLACK	NO. FACULTY WHITE
Baldwin	780	457	54	11	17
Bear	630	183	346	9	14
Bellinger Hill	300	188	34	5	6
Bellingrath	1,230*	858	232	17	26
Booker Washington	420	234	3	6	6
Capitol Heights Ele.	570	128	191	6	8
Capitol Heights Jr.	1,200	314	662	17	23
Carver Ele.	780	393	9	8	9
Carver Jr.	660	350	547	16	18
Carver Sr.	1,100**	773	645	24	41
Catoma	240	52	125	3	4
Chisholm	810	331	478	15	19
Cloverdale	1,170	445	832	17	30
Crump	990	219	775	16	22
Daisy Lawrence	720	363	5	8	9
Dalraida	630	116	389	9	13
Dannelly	780	220	495	11	17
Davis	630	678	47	14	17
Dozier	750	120	712	15	17
Dunbar	660	296	38	8	9
Fews	720	643	1	14	15
Flowers	780	150	522	11	16
Floyd	1,350*	416	695	16	27
Forest Avenue	480	120	248	8	10
Georgia Washington	1,290	428	1,010	21	34
Goodwyn	1,500	586	902	22	32
Harrison	750	283	393	13	16
Hayneville Road	1,200	713	22	13	18
Head	690	107	481	10	15
Highland Avenue	390	106	211	5	9
Highland Gardens	1,020	287	485	15	18
Houston Hill Jr.	570	263	350	10	16
Jefferson Davis	2,100	832	1,486	37	62
Johnson	660	123	484	9	16
Lanier	2,250	737	739	23	46
Lee	2,300	889	1,610	36	73
Loveless	1,140	823	1	16	20
MacMillan	390	205	69	6	7
McIntyre	1,500	802	20	15	16
Montgomery Co. High	570	392	55	8	17
Morningview	600	99	445	10	14
Paterson	810	516	21	11	14
Peterson	600	119	329	8	11
Pintlala	270	164	13	3	5
Southlawn	840	314	375	13	14
Vaughn Road	750	194	608	14	19

*Combined elementary and junior high
**Six rooms not needed in the elementary program are used by the senior high school

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